1982

Kelly Graff and Keri Graff v. Boise Cascade Corp. : Brief of Defendants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

KELLY GRAFF and KERI GRAFF, his wife,

Plaintiffs- Appellants,

vs. No. 18062

BOISE CASCADE CORPORATION, a corporation,

Defendant-Respondent.

BRIEF OF DEFENDANTS

Appeal from the Judgment of the
Fourth Judicial District Court, Utah County
Honorable David Sam, Judge

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

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BRIEF OF RESPONDENTS

NATURE OF THE CASE

Plaintiff's-Appellants KELLY & KERI GRAFF (hereinafter "The GRAFFS") take this appeal from a Declaratory Judgment Action filed first before the Third Judicial District Court, and later transferred to the Fourth Judicial District Court, seeking to invalidate a mechanics lien filed against the GRAFFS property by defendant- respondent BOISE CASCADE CORPORATION (hereinafter "BOISE").

DISPOSITION IN LOWER COURT

The matter was submitted to the court on cross motions for Summary Judgment. Following extensive briefing, the court granted BOISE'S Motion for Summary Judgment, and denied the GRAFFS Motion.

As far back as 1909, the Utah Supreme Court, in Park City Meat Co. v. Comstock Silver Mining Co., 103 P.254, refused to invalidate a mechanic's lien for merely "technical" deficiencies. In that case, the court discussed the proper judicial construction of the mechanic's lien statute, and stated that:

> "The more modern decisions . . . are to the effect that mechanic's lien statutes should receive a fair and reasonable, if not a liberal, construction, with a view to preserving their spirit and effectuating their purposes. (citations omitted) It may be further said that the more modern decisions are practically harmonious in holding that where there has been a substantial compliance with the statute created in the lien, and the lien has in fact been established, the lien so established will not be defeated by mere technicalities not by nice distinctions. (citing) Lumber Co. v. Martin, 31 Utah 249, 87 P.2d 714; 20 A. & E. Encyclopedia (2d Ed.) 276.

In the more recent case of Chase v. Dawson, 215 P.2d 390 (Utah 1950), the Utah Supreme Court construed the mechanic's lien statutory notice requirements and stated that "substantial compliance with the statute is all that is required."

These cases are in accord with the general rule as stated in 53 Am. Jur. 2d "Mechanic's Liens", 227:

> ". . . recognition has been given to the principle that where the purpose of the requirement that a particular statement be included in the claim of lien has been achieved and no one is prejudiced, technical requirements should not stand in the way of achieving the purpose of the mecahnic's

> lien law. Thus, even though a claim contains some defect or error it may be upheld where the owner is apprised of the claim and not misled thereby or prejudiced in any manner. Immaterial errors or defects do nto avoid the lien." (Citations omitted).

The Graffs argue before this court, as they did below, that the foregoing "substantial compliance" standard has been abandoned in Utah and in other jurisdictions, in favor of a "strict compliance" standard which invalidates Notices of Mechanic's Liens on the basis of small, technical inconsistencies. In support of this contention, the Graffs cite numerous cases where defects appearing on the face of Notices of Mechanic's lien, supposedly analogous to those asserted in the instant case, have been held to invalidate the respective lien holders' lien interest.

In fact, the principles of law relied upon by Plaintiffs in their attempt to invalidate Boise's lien have co-existed with doctrine of substantial compliance ever since the mechanic's and materialman's lien was first recognized as a statutory remedy to the contractor and supplier, and in no way abrogate or modify the "substantial compliance" standard. The two principals may be stated as follows:

1. A mechanic's lien is a creature of statute, in derogation of the common law rights of the property owner, and must

therefore be in complete compliance with all statutory prerequesites to its validity (see Utah Savings and Loan Association v. Mecham, 12 Utah 2d. 335, 366 P.2d 598 (1961); Eccles Lumber Company v. Martin, 31 Utah 241, 87 P. 713 (1906)).

2. Where, however, a notice of mechanic's lien is in compliance with the substance and purpose of the statute giving rise thereto, technical deficiencies and nice distinctions, which do not inure to the detriment of any parties, will not be permitted to defeat the validity of the lien filing (see Chase v. Dawson, 215 P.2d 390 (1950); Park City Meat Company v. Comstock Silver Mining Company, 103 P. 254 (1909)). As stated by the Arizona Court of Appeals in Lewis v. Midway Lumber, Inc., 114 Arizona 750, 561 P.2d 750 (Ct. App. Ariz. Div. 2, 1977),

> "The provisions of ARS 33-993 must be strictly followed. (citations omitted) However, the Arizona liens statutes are remedial and to be liberally construed. (citations omitted) This means that the steps required by ARS 33-993 to impose the lien must be followed, but in determining what these steps are, the Court will give the words a meaning which is reasonable, consistent with all the language used, and conducive to the purpose accomplished by the enactment of the statute. Thus, substantial compliance not inconsistent with the legislative purpose is sufficient."

The Arizona Court is in accord with the general principles of mechanic's lien law expressed in 53 Am. Jur. 2d., Mechanic's Liens, 210: "The statutory requirements, whatever they may be,

must be substantially, or, as stated in some cases, strictly, compiled with, in order to perfect the lien. A claim which does not comply with such requirements is defective and invalid. On the other hand, the lien claim is not itself a pleading, and substantial compliance in good faith is sufficient to meet such requirements, and some statutes expressly declare that substantial compliance shall be deemed sufficient."

In light of the foregoing, the issue with which this court is faced is that of whether or not Boise's Notice and Claim of Mechanic's lien in the instant case (attached as Exhibit "A" to the Graffs' Appellate Brief) substantially complies with Utah's Mechanic's Lien Law, notwithstanding the alleged infirmaties asserted by the Graffs.

POINT II

BOISE'S NOTICE AND CLAIM OF MECHANIC'S LIEN SUBSTANTIALLY COMPLIED WITH THE VERIFICATION AND OATH REQUIREMENTS OF UTAH LAW.

As show on the face of the Notice and Claim of Mechanic's lien relied upon by Boise (see Exhibit A to the Graffs Appellate Brief), Boise's agent, Berk Buttars, signed his name to the notice above a printed oath form which admittedly complies with Utah law, and had his signature duly notarized. The Graffs argue that this was insufficient, in that Mr. Buttars did not sign his name again following the printed oath.

In a case which was factually identical to the instant case, and where a signature was omitted following the form of oath but was signed on the line above, the Alaska Supreme Court held that the verification requirement was satisfied. See, Stephenson v. Ketchican Spruce Mills, Inc., 412 P.2d 496 (Alaska 1966). In that case, the court stated:

> "Substantial compliance with the verification requirement is sufficient. There is a substantial compliance here. The form of oath followed by the words 'subscribed and sworn to before me. . .', and the notary public's signature, amounts in substance to a certificate by the notary that the claim of lien was verified by the oath of Anderson. The claim of lien is not ineffective by reason of any insufficienty in the requirement for verification." Id. at 499.

To the same effect are the cases of Lyons v. Howard, 16 N.M. 327, 117 P.842 (1911) and Aimslie v. Kohn 16 Or. 363, 19 P.97, 103 (1888).

In support of their contention that the "substantial compliance" standard has been abandoned with respect to verification and oath requirements of mechanic's lien law, the Graff's cite the decisions of H.A.M.S. Company v. Electrical Contractors of Alaska, 563 P.2d 258 (Supreme Court Alaska, 1977), and First Security Mortgage Company v. Hansen 631 P.2d 919 (1981) for the proposition that, in Alaska as in Utah, the principles announced in the Ketchican Spruce Mills case have been overruled in favor

of a strict compliance standard. Such an assertion is clearly misplaced.

In the case of First Security Mortgage Company v. Hansen, cited supra, which dealt with facts substantially similar to those underlying the H.A.M.S. Company decision in Alaska, Justice Howe affirmed a trial court decision invalidating a notice of mechanic's lien containing a corporate acknowledgment, but no verification of the contents of the lien. The acknowledgement there in question read as follows:

> "on the 9th day of November, 1977, personally appeared before me Roy B. Moore, who being duly sworn, did say that he is the attorney for Integral Steel Structures, and that said instrument was signed in behalf of said corporation by authority of a resolution of its board of directors, and said Roy B. Moore acknowledged to me that said corporation executed the same."

Justice Howe aptly observed that "the acknowledgement in this case did not contain even a general verification of the subject matter of the notice of claim. The only fact that was sworn to was the identity and authority of the person signing the claim. There is no suggestion that he personally vouched for the accuracy of the facts underlying the claim." Justice Howe then quoted from the decision of H.A.M.S. Company v. Electrical Contractors of Alaska, Inc., cited supra, observing that

> "It is establised in law that a verification is sworn statement of the truth of the facts stated in the instrument which it verifies.

> A verification differs from an acknowledgement in that the latter is a method of authenticating an instrument by showing that it was the act of the person executing it."

This Court was entirely correct in refusing to validate a Notice of Mechanic's Lien which nowhere contains even the implication of a verification. Case law is very clear that such an omission is material, and does not substantially comply with the requirements of law. In the instant case, however, the language of verification appearing on the face of the notice of lien is clear and unmistakable, and the lien claimant's oath in connection therewith is duly notarized. The only relevant question is whether or not the lien claimant's signature appears in the proper location. As such, the Hansen decision, like H.A.M.S. decision, is inapplicable on its facts. It should, however, be pointed out that the Hansen decision, even in its dicta, nowhere makes mention of an abandonment of the substantial compliance standard in effect in Utah for 75 years. 1/

1/ It should also be noted that, in 1980, the Supreme Court of Alaska reaffirmed the substantial compliance test in the decision of Anchorage Sand and Gravel Company Inc. v. Wooldridge, 619 P.2d 1014 (Sup. Ct. Alaska 1980). In that case, a Notice of Mechanic's Lien contained a printed notary's jurat, certifying that a corporate officer had appeared before the notary, and had sworn that the contents of the notice of lien were true and (continued on next page)

Other Western jurisdications have similarly adopted the substantial compliance test regarding verifications of claims of mechanic's lien. In the decision of Garrett Building Centers, Inc. v. Hale, 95 N.M. 450, 623 P.2d 570 (1981), the New Mexico Supreme Court specifically adopted the substantial compliance test, ruling that technical deficiencies the verification of the two mechanic's liens there in question were not sufficiently grave to invalidate the liens, where none of the parties in interest had been prejudiced thereby. The Graffs' attempt to rely on the decision of Lewis v. Midway Lumber, cited supra, for the proposition that the State of Arizona has abandoned the substantial compliance standard is clearly misplaced. That decision, where relevant to this case, dealt with the total omission, by two mechanic's lien claimants, of the name of the owner from the lien notice. The Arizona Supreme Court specifically endorsed the doctrine of substantial compliance. The same standard was later reaffirmed in the case of Westinghouse Electric Supply

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(footnote continued)
correct. The officer did not sign following the certification: only the notary affixed his signature thereafter. The court, observing that "no particular form of oath or affirmation is required by Alaska law", ruled that, as the documents clearly evidenced that the officer had appeared before the notary and had sworn to the truth of the contents of the lien, the statutory requirements had been satisfied.

Company v. Western Seed Production Corp., 119 Ariz. 377, 580 P.2d 1231 Ct. App. Ariz., Div. 1, 1978).

The only decision quoted by the Graffs, in fact, which does not fully comport with a substantial compliance standard regarding verification is that of Saunders Cash-Way Lumber and Hardware Company v. Herrick, Mont. 587 P.2d 947 (Sup. Ct. Montana, 1978). In that case, it was held that a verification in which a lien claimant swore to the content of the lien as true "to the best of his knowledge, information and belief" invalidated the mechanic's lien in that the verification oath did not reflect sufficient certainty. The decision must be regarded as an anomaly, and has since been ignored in other jurisdictions on similar facts (see, e.g. Marsh v. Coleman, 93 N.M. 325, 600 P.2d 271 (Sup. Ct. N.M., 1979)). Such a technically demanding standard is clearly at variance with the underlying policy of mechanic's lien law, and would inflict needless injury on the valid rights of countless lien claimants.

In the instant case, Boise's agent, Berk Buttars, signed the notice of lien in question, and his oath regarding the accuracy and truth of the notice was duly notarized. No one has been misled, prejudiced or injured by Mr. Buttars' failure to affix two signatures to the document instead of one (see Point IV infra). It is therefore submitted that, as the trial court

observed, Boise's Notice and Claim of Mechanic's Lien was in substantial compliance with the verificationa nd oath requirements of Utah law, and created a valid mechanic's lien on the Graffs' property.

POINT III
BOISE'S ERRONEOUS OMMISSION OF THE PRINCIPAL CONTRACTOR'S NAME ON THE FACE OF ITS NOTICE OF MECHANIC'S LIEN DID NOT INVALIDATE BOISE'S LIEN INTEREST UNDER UTAH LAW.

The Graffs' second contention regarding the validity of the lien notice filed by Boise in the instant action deals with the fact that it allegedly fails to state the name of the individual to whom Defendant furnished materials. As can be seen from the fact of the document, Boise inadvertently entered its own name, rather than that of Roncor, in the space provided for the name of the recipient of the materials. Roncor was listed, however, as the owner of the lands, buildings, and improvements to be charged with the lien. Moreover, no allegation is made that the omission complained of inured to the prejudice of any party in any way. To the contrary, the Graffs' conduct in the instant action clearly evidences that they had actual reocrd notice of the identity of the lienor under Boise's Notice of Lien. The rule in such cases was stated by the Nevada Supreme Court in Peccole v. Luce and Goodfellow, 212 P.2d 718, 723-24 (1949):

> "Courts will not give the statute such a narrow or technical construction as to

> fritter away, impede or destroy the right of the lien claimant. As a general rule a mistake in the statement as to the name of the person with whom plaintiff contracted or by whom he was employed will not defeat the lien, where there was no intention to deceive and no one has been misled to his detriment." (emphasis added)

It has also been held by several courts that, where the person by whom the lienor was employed or to whom he furnished materials can be reasonably inferred or ascertained upon an examination of the entire lien, notice is sufficient and the lien is valid. See e.g., Pecolle v. Luce and Goodfellow, supra at 725; 53 Am. Jur. 2d "Mechanic Liens" 228 at p. 749, and cases cited therein; First National Bank in Fort Collins v. Sam McClure and Son, Inc., Colo., 431 P.2d 460 Sup. Ct. Colo. 1967); Boyce v. Knudson, 219 Kan. 357, 548 P.2d 712 (Sup. Ct. Kan., 1976); State Ex. Rel Nilsen v. Hoff, Or. App., 474 P.2d 11 (Ct. App. Or., 1970). 2/ Once again the prevailing standard is that of substantial compliance.

2/ Before the court below, the Graffs represented that the Pecolle decision had been overruled by the Nevada Supreme Court in the decision of Fischer Brothers v. Harrah Realty Company, Nevada 545 P.2d 203 (Sup. Ct. Nev. 1976). In that per curiam decision, the notice of mechanic's lien in question was invalidated in that the claimant made no attempt of any kind to serve notice of the lien upon the property owner, as required by N.R.S. 108.227. It is clear that a lien claimant who completely ignores such a statutory requirement has not substantially complied with the applicable mechanic's lien law. Neither the Fisher Brothers decision, however, nor any other case of record overrules the (continued on next page)

POINT IV

CONSIDERATIONS OF POLICY AND EQUITY DEMAND ENFORCEMENT OF BOISE'S LIEN

The Utah Supreme Court, in the decision of Frehner v. Morton, 18 Utah 2d. 422, 424 P.2d 446 (1967), observed that the purpose of the Utah Mecahnic's Lien Statute is "to protect those who have added directly to the value of real property by performing labor or furnishing material upon it. (Citation omitted) The statute is intended and designed to prevent the owner of land from taking the benefits of improvements placed on his property without paying for the labor and materials that went into them."

There is no question in this case of unfair injury, or even of surprise. The Graffs, by accepting title to the property in qeustion, impliedly undertook to satisfy all encumbrances of record thereon. They now seek to escape that responsibility by setting before the Court two inconsequential shorcomings appearing on the face of Boise's Notice of Mechanic's Lien. To invalidate Boise's interest in the subject property on such grounds would fly directly in the face of the purpose and policy of mechanic's lien law. It would, moreover, leave Boise without recourse; the

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(footnote continued)
Peccole opinion, which was, in fact, cited by the Arizona Supreme Court as controlling authority for the continued vitality of the substantial compliance doctrine in the case of Westinghouse Electric Supply Company v. Western Seed Production Corp., cited supra.

general contractor, Roncor, Inc., is now inoperable and judgment-proof. It is precisely this situation that mechanic's lien law was devised to remedy.

CONCLUSION

Based upon the foregoing, it is submitted that the trial courts order granting Boise's Motion for Summary Judgment should be affirmed by this court.

DATED this 30th day of March, 1982.

Respectfully submitted,

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